DOCUMENT RESUME

ED 473 338 EA 032 372

AUTHOR	Rhoades, Merry; Rittenmeyer, Steven; Carper, Gayle Tronvig
TITLE	In Search of Klebold's Ghost: Investigating the Legal Ambiguities of Violent Student Profiling.
PUB DATE	2002-11-00
NOTE	16p.; In: Balancing Rights: Education Law in a Brave New World. Papers [of the] Education Law Association (ELA) Annual Conference (48th, New Orleans, LA, November 14-16, 2002); see EA 032 361.
PUB TYPE	Information Analyses (070) -- Speeches/Meeting Papers (150)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS
DESCRIPTORS	Child Safety; Elementary Secondary Education; Individual Psychology; *Legal Problems; *Profiles; Psychological Characteristics; Psychological Evaluation; Public Schools; School Law; *School Safety; *Student Rights; *Violence

ABSTRACT

In an effort to address the series of school shootings in the 1990s, several organizations compiled and published checklists and other materials for schools to use in identifying students who might be capable of violent acts. As a consequence, schools have entered into the controversial world of profiling. In this paper, the authors use their experience in education and in law enforcement as a basis to analyze the application of profiling techniques in educational settings, and to discuss the legal ramifications of such policy initiatives. Starting with a brief historical introduction, the three types of profiling are described. The good and bad aspects of profiling in law-enforcement practices are presented. Improper use can impinge upon citizens' Fourth and Fourteenth Amendment rights, that is, upon their freedom from unreasonable searches and seizures, and upon the guarantee of due process and equal protection, respectively. At this time, there is no scientific or other objective evidence to support the use of profiles to penalize or stigmatize public-school students. All presently available "checklists" and "warning signs" carry blanket disclaimers of accuracy from their creators and are uniformly rejected as vague, if not discriminatory, collections of guesses and stereotypes. (RT)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 473 338

In Search of Klebold's Ghost: Investigating the Legal Ambiguities of Violent Student Profiling.

Merry Rhoades
Steven Rittenmeyer
Gayle Tronvig Carper

November 2002

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

✔ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE, AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY, HAS BEEN GRANTED BY

R. Wagner

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

2A

EA 032 372

BEST COPY AVAILABLE

In Search of Klebold's Ghost: Investigating the Legal Ambiguities of Violent Student Profiling.

By: Merry Rhoades, Steven Rittenmeyer, Gayle Tronvig Carper

Introduction

The series of school shootings that occurred in the 1990's launched efforts of several organizations to compile and publish checklists and warning signs designed for use by schools to identify students who might be capable of violent acts. With the adoption of these checklists, schools, perhaps naively, entered the world of profiling. Though new in education, profiling has been a tool in law enforcement for many years. The authors' experience in education and law enforcement provided a basis to to analyze the application of profiling techniques in educational settings and to discuss the legal ramifications of such policy initiatives.

Profiling and Law Enforcement

The word "profiling" in a conversation with police officers causes much consternation, largely due to intense media attention in recent time to racial profiling. Once the word is out, however, the response is "Most of what we do is profiling – but not the bad kind."

The "good" kind of profiling, that is, not based solely on race, has been accepted for many years in all aspects of police work and will continue to be a necessary and effective tool. Most of the literature about profiling refers to a first use of it to understand Adolph Hitler.[1] Another famous use of profiling occurred in New York in the 1950's to identify "The Mad Bomber".[2] A psychiatrist, Dr. James A Brussel, studied the series of bombings attributed to "The Mad Bomber" and profiled the offender's age, heritage, place of residence and personality. Accounts of this incident relate that the psychiatrist predicted that the offender would be wearing a double-breasted suit with all of the buttons on the jacket buttoned.[3] The individual eventually arrested fit all characteristics in the profile, including the buttoned up jacket.[4]

Criminal profiling, often referred to as psychological profiling, is used to identify important crime scene and behavioral factors related to the offender to enable police to analyze crime scenes and apprehend offenders.[5] It is also defined as the science of reconstructing a picture or portrait of the type of crime and the criminal involved through an examination of the crime scene.[6] The FBI's definition of criminal profiling is "an investigative technique by which to identify the major personality and behavioral characteristics of the offender based upon analysis of the crime(s) he or she has committed"[7]. The theory is that once an investigator has an idea of what type of person is likely to have committed a certain crime, the investigator will focus on individuals who fit the profile.[8] Another group of authors divide profiling into three types: diagnostic evaluations, crime scene analysis and investigative psychology.[9] Diagnostic evaluations are profiles developed by psychiatrists and psychologists based on clinical practice and psychological disorders such as those found in the Diagnostic Statistical Manual.

The FBI has been involved in the second type of profiling, crime scene analysis, since 1972 and assists various law enforcement agencies through its Behavior Science Unit and its Behavior Sciences Investigative Support Service Unit. The FBI and several states have developed computerized statistical

EA032372

databases to enable law enforcement agencies to easily identify a criminal profile and serial trends in behaviors.[10]

The third type of profiling, investigative psychology, uses techniques of social psychology, criminology and forensic psychiatry in place of police experience or offender data.[11] This theory, developed by David Canter at the University of Surry, relies greatly on victim information to predict facts about the offender.

Profiling is used by law enforcement in many ways. The Crime Classification Manual[12] categorizes murderers into identifiable groups on the theory that the way in which a murder was committed could identify the perpetrator. In *Profiling violent crimes: An investigative tool*, Holmes and Holmes created typologies of serial murderers[13]. Profiling has been effective in hostage negotiations, threat communication, identification of serial rapists and arsonists[14] hoaxers,[15] stalkers and bank robbers.[16] Other uses include using profiles to guide police interrogations or prosecutors' cross examinations; set traps in the media to find offenders; to predict dangerousness in sentencing or parole decisions.[17]

A review of the literature shows an amazing amount of profiling done in other areas. Profiling has been done for certain types of consumers,[18] teachers,[19] graduate students,[20] people who access to the Web,[21] and computer intruders.[22] It is used in managing health care[23] and in identifying violence-prone employees.[24]

So why does profiling have a bad name? Because "good" profiling seeks a person who has committed a crime; "bad" profiling seeks a person before a crime has been committed. Additionally, there has been intense focus on actions of the police that result in disparate rates for the arrests, searches and seizures of black and Hispanic people over the past 10 or so years. Racial profiling is defined by the Department of Justice as

> "...any police-initiated action that relies on race, ethnicity or national origin rather than the behavior of an individual or information that leads the police to a particular individual as being, or having been, engaged in criminal activity." [25]

Skolnick and Caplovitz[26] contend that the "war on drugs" was used as an acceptable reason for police to stop black and Hispanic drivers. Combined with the myth that non-whites are more likely to be in the drug trade, black and Hispanic drivers began referring to this as being arrested for the crime of "driving while black". [27]

The "war on drugs" also provided the impetus for the most commonly used, and abused, profile: the drug courier profile. A drug courier profile seeks to identify criminals before an arrest is made. Heumann and Cassak[28] cite a court description of drug courier profiles as including factors as follows:

> "...arrived late at night...arrived early in the morning; one of first to deplane...one of last to deplane...deplaned in the middle; used a one way ticket...used a round trip ticket; carried brand new luggage...carried a small gym bag; traveled alone...traveled with a companion; acted too nervous...acted too calm; [...]walked rapidly through airport...walked aimlessly through airport...

This is the danger schools will encounter in the use of profiling; that the checklists being promulgated by national associations may be far too loose to be of any value.

Remedies

In the context of this paper, the Fourth Amendment freedom from unreasonable searches and seizures and the Fourteenth Amendment guarantee of due process and equal protection are at issue.

Until the U.S Supreme Court's decision in *Whren v. U. S.*,[29] a person who believed he or she was stopped while driving or riding in a vehicle because of his or her race, could challenge that stop as a pretext arrest. A pretext arrest occurs when an officer uses a minor traffic violation to stop a motorist because the officer has a "hunch", not rising to reasonable suspicion or probable cause that something else, usually drug activity, is occurring. The U.S. Supreme Court held that the subjective motives of the police officers had no place in determining whether the stop was constitutional or not. The only relevant test was an objective one: whether a police officer "could" make the stop, not whether an officer "would" make the stop. The Court further stated:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment... [30]

thus closing Fourth Amendment jurisprudence as an avenue to challenge racial profiling. It is extremely difficult to establish an Equal Protection violation because among other elements, a plaintiff must show that the police had a purposeful and intentional discrimination against them because of their race.[31] Some who wish to challenge racial profiling turned to the state courts.

State Response

The states of Washington, Minnesota, Arizona and Arkansas have rejected the *Whren* analysis as applying under their respective state constitutions. In *Washington v. Ladson*,[32] the Washington Supreme Court held that pretextual traffic stops violate the Washington State Constitution. Ladson, an African American, was a passenger in a car driven by Richard Fogle, also African American and the officers had heard an unsubstantiated street rumor that Fogel was involved in drug dealing. The officers, never denying that the stop they made was pretextual, eventually found a small handgun, some marijuana and $600 on Ladson after arresting Fogel for a suspended driver's license. In its opinion, the court states:

> We begin our analysis by acknowledging the essence of this, and every, pretextual traffic stop is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. [33]

> However, the problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason. [34]

Both the Supreme Court of Minnesota and the Supreme Court of Arizona have held that, despite *Whren*, that "the pretext factor is relevant" during searches not based on probable cause.[35] Finally, the Supreme Court of Arkansas rejected application of *Whren* stating "...[T]here is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights."[36]

Another approach is shown in *New Jersey v. Soto*[37], which is a selective enforcement case and is based on the rights of equal protection and due process. In *Soto*, 17 persons of African ancestry alleged that their arrests for traffic violations resulted from discriminatory enforcement by the New Jersey State Police. Both sides in the case created a database of all stops and arrests made by the police at certain Turnpike exits during randomly selected days. The opinion goes into lengthy detail on the specifics of the database, but the court found that the defendants had established a prima facie case of selective enforcement[38] and that the State Police hierarchy "allowed, condoned, cultivated and tolerated discrimination".[39]

The question now posed is whether educators benefit from the law enforcement experience in racial profiling? Can school administrators avoid the problems associated with this practice and attain the goal of safe schools? We turn to a discussion of profiling in schools.

Profiling Clears The Schoolhouse Gate

Checklists and "Warning Signs"

Some of the first scholarly responses to the spate of school shootings during the decade of the 1990s were the publication of checklists of characteristics of the student perpetrators. The National School Safety Center (NSSC) produced a "Checklist of Characteristics of Youth Who Have Caused School-Associated Violent Deaths." The authors assert: " After studying common characteristics of youngsters who have caused such deaths, NSSC has identified the following behaviors, which could indicate a youth's potential for harming him/herself or others." Billed as an early warning signal for implementation of school safety and crisis prevention/intervention programs, the list of twenty common traits range from "(h)as previously brought a gun to school" to "(r)eflects anger, frustration and the dark side of life in school essays or writing projects." A disclaimer accompanies the checklist declaring that "While there is no foolproof system for identifying potentially dangerous students, the list provides a starting point for educators seeking to prevent student initiated violence."[40]

Contemporaneously, a joint effort between the U.S. Department of Education (DOE) and the Center for Effective Collaboration and Practice of the American Institutes of Research and the National Association of School Psychologists, produced *Early Warning, Timely Response: A Guide to Safe Schools.*[41] Section 3 of the publication, entitled "What to Look For", contains another compilation of early indicators of potential student violence. However, prior to listing the early warning signs, the report takes pains to repeatedly declare the limitations of the characteristics and to set out various preventative principles for those who use the signs. One example of these cautionary statements is: " Such signs may or

may not indicate a serious problem—they do not necessarily mean that a child is prone to violence toward self or others." Another states: "(I) t is important to avoid inappropriately labeling or stigmatizing individual students because they appear to fit a specific profile or set of early warning indicators." A third admonishes: "(T)here is a real danger that early warning signs will be misinterpreted."

The Department of Education list contains sixteen characteristics compared to the National School Safety Center's twenty. Included are "social withdrawal", "excessive feelings of isolation and being alone", "low school interest and poor academic performance", "feelings of being picked on and persecuted", "patterns of impulsive and chronic hitting,...intimidating, and bullying behavior", and intolerance for differences and prejudicial attitudes".[42]

McGee and DeBernardo created a daunting, and often contradictory, list of characteristics of what they termed the "Classroom Avenger." Among the inclusionary traits are; male, physically healthy, Caucasian, middle class, "standoffish", as infants-colicky, temperamental, "delayed milestones", no participation in prosocial groups or 'normal' pastimes, interest in real and fictional violence in the media, and "somehow odd". "Classroom Avengers" are described as friendless "loners." Yet the authors present a detailed description of the avenger's "associates". But perhaps the fatal contradiction appears in the disclaimer:

> "The following hypothetical portrayal... is not based on any type of statistical or actuarial model of prediction. Instead, it is both subjective and impressionistic and it is partially informed by a limited number of cases and an equally limited amount of fragmentary data and unconfirmed anecdotal accounts derived from official police reports and the popular media...Any attempt to utilize this behavioral profile in clinical or forensic setting should be cautious and tempered with a clear understanding of the potential for both 'false positive' and 'false negative' errors of prediction". [43]

Writing in the February, 2000 *School Administrator Web Edition*, an organ of the American Association of School Administrators; Fey, Nelson and Roberts chronicled *The Perils of Profiling*."[44] The authors refer specifically to the NSSC "Checklist of Characteristics of Youth Who Have Caused School – Associated Violent Deaths" and the DOE's *Early Warning, Timely Response: A Guide to Safe Schools* behavior lists as the basis for their analysis. They first point out the inconsistency and wide divergence of the lists, as well as the lack of empirical evidence underlying the entries. Moreover, the ambiguity of items such as "excessive feelings of rejection", "tends to blame others" and "is on the fringe" are seen as immeasurable, if not unidentifiable. Thus placing any administrator seeking to use either of the lists in the unenviable position of deciding which to choose. In addition, the lack of empirical evidence underlying the content of the lists is seen as providing a basis for court challenges alleging arbitrary and capricious conduct should a student be wrongfully labeled. The authors also assert that many of the characteristics are detectable only in a setting where teachers know the most intimate details of their students' lives. With large class loads in large school settings it is impossible, they assert, to know such things as experiences outside of school, family dynamics, preferences in TV, and whether a particular child enjoys abusing animals. However, the most troubling aspect of profiling seen by Fey, Nelson and Roberts is the potential for invidious deprivations of equal protection guarantees and privacy rights. These authors conclude that

the search for effective methods of violence protection must continue. For, as they declare: " If profiles were the solution to violence prevention, all prisoners would be guilty, all crimes would be solved and all future crimes would be prevented."[45]

At least two organizations have issued position statements on the validity of student profiling as a method of detecting and preventing future violence. The Center for the Study and Prevention of Violence (CSPV) at the University of Colorado-Boulder declared in a 2000 online announcement:

> "To date, no scientific research has been conducted to determine the efficacy of profiling, and evidence of the success of past profiling efforts by law enforcement has not been encouraging ...The checklists and software that are currently available do not facilitate a means of finding help and resources to address the students' needs beyond identification. There is real danger in profiling if there is a high false positive rate and no mechanism in place for acting on the early warning signs."
> "...The identification of early warning signs should not be used as a process to label children."[46]

The second position statement was adopted on July 12, 2001 by the Board of Directors, National Association of Secondary School Principals (NASSP). In a contemporaneous online announcement the organization set out its "Guiding Principles". These are:

> Student profiling unfairly labels many nonviolent students as potentially dangerous and misidentifies other "safe" students who may actually commit a violent act.
> Current profiling techniques lack the specificity needed to be effective.
> The over-identification and misidentification of potentially violent students can result in a school atmosphere that is overly fearful, distrustful, and not conducive to teaching and learning.
> Due to the high level of inaccuracy, profiling runs the risk of stigmatizing and stereotyping students and endangering their civil rights, especially the rights of those students who are viewed more "different" than "normal".

The report recommends that school principals "refrain from using student profiling as a means of identifying potentially violent students."[47]

Legal Commentary

At this writing the scholarly comment on the topic of student profiling is scarce. There are a number of articles discussing the broader topics of school safety, security and violence prevention.[48] None mention profiling. Rapp makes no mention of student profiling in sections dealing with "Apprehension and Restraint of Dangerous Students" [49] and "Creating a Safe and Welcoming School Environment." [50]

Perhaps the earliest reference to student profiling among legal commentators came from American Civil Liberties Union (ACLU) President Nadine Strossen in her keynote speech to a Drake University audience during a 1999 conference commemorating the thirtieth anniversary of *Tinker v. Des Moines Independent School District.* Referring to media coverage of school violence incidents, Stroessen stated:

> "In addition to generating unfounded fears that 'it could happen here', the sensationalized coverage tended to propel panic about all teenagers as potential terrorists-or at least all of those who wear black or favor Goth-themed Web sites, or are otherwise 'different'. In this vein, more schools are moving toward 'profiling' their students in yet another chilling parallel to a tactic that comes from the criminal justice field and has been justly condemned as discriminatory and ineffective in that context.
> As I and other ACLU spokespeople have constantly been reminding school officials and journalists: 'Different does not mean dangerous.' Conversely, though, stifling difference among our

nation's youth and students is dangerous-dangerous not only to their freedoms and dignity, but also to their education and to their potential contribution to their communities. " [51]

Kirk A. Bailey, analyzed the *Legal Implications of Profiling Students for Violence* as part of George Washington University's Hamilton Fish Institute on School and Community Violence effort to evaluate school violence prevention programs.[52] Bailey discusses substantive due process (validity and inclusiveness), search and seizure, equal protection and privacy/educational records issues.

Matters of general validity involve objectivity and over-inclusiveness. Citing constitutional precedent set out in cases such as *U.S. Lopez*[53] , *U.S. v. Riggs*[54] and *U.S. v. Bell*, [55] Bailey asserts that courts define an effective profile as one free of subjectivity and capable of objective application in a given circumstance. Conversely, where discretion and prejudice can be interjected the system will fail constitutional muster. According to the author, prior association of the parties compromises objectivity. Thus, for objective application of any profiling system to occur, there can be no significant or compelling personal history between teachers/school authorities and students that suggests unfairness, animosity, or favoritism. Schools are far different environments than airports, where profiling began. At the latter strangers come together in a very limited context with comparatively little opportunity or incentive for officials to interpose individual discretion or prejudice in the application of such things as drug courier profiles. The school environment is the opposite. Teachers and principals are encouraged to become as familiar with as much of their students' lives as possible.

The validity of any profiling system rests in a proper balance between accuracy and sensitivity. A valid system will accurately identify potential violators while being sensitive enough not to include individuals who do not pose a danger. Citing social science research, Bailey asserts that sensitivity decreases as accuracy increases and vice versa. Therefore, if the goal of society is to identify all potentially violent youth, interventions must be positive and educational rather than penal. Referring to the *Lopez* decision, the author declares that the greatest legal objection is that the use of profile evidence to impose punitive responses deprives the youth of rights and opportunities based on potential for violence acts rather than the act or wrongdoing itself. Something our society abhors. Therefore, profile evidence is to be avoided as a basis for deprivation of any rights or liberties. [56]

In May, 2002, the U.S. Secret Service published the most complete and authoritative analysis of the school shooting phenomenon to date. *The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States*,[57] and the companion volume, *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates*[58] are head and shoulders above any other governmental or nongovernmental endeavor. A combined effort of the Secret Service's Safe School Initiative and the U.S. Department of Education's Safe and Drug-Free Schools Program, the report and guide studied 37 school shooting incidents in America from 1974 until 2000. The findings provide a basis for understanding and for assistance in preventing future attacks via the threat assessment method.

Chapter 3, "Findings of the Safe School Initiative", begins by characterizing the attackers. The initial finding in this endeavor is: "There is no accurate or useful "profile" of students who engaged in targeted school violence."[59] The accompanying explanation of the finding states, *inter alia*:

> " Although all of the attackers in this study were boys, there is no set of traits that described all or even most of the attackers...
> The attackers came from a variety of family situations, ranging from intact families with numerous ties to the community, to foster homes with histories of neglect...
> ...(A)ttackers differed considerably from one another in their academic achievement in school, with grades ranging from excellent to failing...
> Attackers' histories of disciplinary problems at school also varied. Some attackers had no observed behavioral problems, while others had multiple behaviors warranting reprmand and/or discipline...
> Most attackers showed *no marked change* in academic performance...prior to their attack...
> A few attackers even showed some *improvements* in academic performance...prior to the attack..."[60] (Emphasis in original)

Legal Concerns

Due Process

Student profiling programs carry the potential for penal actions such as suspension, expulsion and/or assignment to an alternative school. In such circumstances a student stands to lose the benefits of attending school.

There is no constitutional right to an education.[61] Still, the U.S. Supreme Court has repeatedly recognized the importance of education in American democracy. One of the clearest statements of that recognition came nearly half a century ago. In its landmark *Brown v. Board of Education* decision the Court declared:

> "Today, education is perhaps the most important function of state and local governments...It is the very foundation of good citizenship... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[62]

Though states are not obligated to operate educational systems, once the decision is made to do so and to compel children to attend, the principles due process must be obeyed.[63] The Fourteenth Amendment protects people against the state itself and all of its creatures, school boards being no exception.[64] Thus, public school students do possess both substantive and procedural rights while at school.[65] On the other hand, education authorities are vested with both the right and obligation to control student behavior that affects the orderly operation of the institution.[66] To that end schools may put into effect reasonable rules of conduct. Moreover, the Supreme Court has held that, " maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures". [67] Additionally, the need to control a variety of unanticipated behaviors which are disruptive requires that school rules not be as detailed as a criminal code.[68] Enter the substantive due process standards against vagueness.

Rules which fail to adequately articulate what conduct is proscribed do not give fair warning to those who may be affected. Moreover, vague regulations vest enforcement agents with inordinate discretion and, thereby, facilitate arbitrary, capricious and illegally discriminatory application.[69] Vagueness is

considered within the context of the rule. As long as prohibited conduct is defined with sufficient definiteness that ordinary people can understand what behavior is unacceptable and in a manner that does not encourage arbitrary and discriminatory enforcement, regulations will be upheld.[70]

Therein lies the fatal problem. Profiling does not deal with conduct. It deals with *potential* conduct. Thus, public school students stand to be deprived of the opportunity to gain an education because of what someone thinks they *might* do. All notions of American justice abhor such a notion. In a clear statement, the U.S. District Court in New York declared in a case involving, so-called, "drug courier profiles":

> "...(O)ur criminal law is based on the theory that we do not condemn people because they are potentially dangerous. We only prosecute illegal acts. Putting a group of potential violators in custody on the ground that this group contained all or nearly all of the people who would commit crimes in the future would raise the most serious constitutional issues".[71]

Still, the *Lopez* decision went on to uphold the profiles used in airports by customs officials to stop and question travelers saying the, "system does not constitute a first step along the road to preventative detention of potentially dangerous classes of persons."[72] To the extent that they are used to assign those identified to alternative education settings(preventative detention) or otherwise to banish, via suspension or expulsion, student profiles conflict with this standard as well as those of substantive due process.

First Amendment Concerns

The quote, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," is arguably one of the most often quoted phrases in public school constitutional cases.[73] To justify action based upon a student's freedom of expression, a school must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[74] Accordingly, the wearing of a black arm band in protest of the Vietnam War cannot be prohibited unless the conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[75]

Fast forward to Tuesday, April 20, 1999 at approximately 11:30 a.m. where two students, dressed in black trench coats, entered the halls of Columbine High School in Littleton, Colorado with shotguns, grenades and homemade bombs and proceeded to take the lives of others located in the building. The shooters, Dylan Klebold and Eric Harris, were members of the Trenchcoat Mafia, a three-year old clique of teens. In 1998, a picture of the group appeared in the Columbine High School yearbook. Most described members of the Columbine Trenchcoat Mafia as embracing a "Goth" appearance – the wearing of all black clothing, white face paint, black eye makeup and lipstick[76]. After the events of April 20, 1999, the appearance of the Trenchcoat Mafia as well as their actions became a topic of discussion. A common query was whether the Columbine High School administration should have "profiled" members of this group as possible future assailants in an act of school violence based upon expression through appearance. Reenter *Tinker* and its progeny.

Following *Tinker* the United States Supreme Court adopted what was commonly referred to the "civility" test in *Bethel School District No. 403 v. Fraser*,[77] finding that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." This case begins the chipping away of the basic precepts of *Tinker* when it held "that the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." As the Seventh Circuit noted in *Baxter v. Vigo*,[78] the *Fraser* Court "cast some doubt on the extent to which students retain free speech rights in the school setting." The *Fraser* principle was further defined in *Hazelwood School District v. Kuhlmeier*[79] by holding that a school district could censor speech that is inconsistent with the "basic educational mission". The legitimate pedagogical concern test was now born. It is within the context of the *Tinker-Fraser-Kuhlmeier* trilogy that an analysis of a possible First Amendment claim arises for the profiling of students based upon physical appearance or association with certain groups as being likely to commit future acts of violence.

Perhaps the most appropriate starting place for purposes of First Amendment implications of student profiling is with the *Kuhlmeier* decision as it is easily distinguishable for the question at hand. *Kuhlmeier* arises from a challenge to a school district's authority to exercise editorial control over a school sponsored publication. From an editorial control standpoint, the pedagogical concern test certainly has its place. It would be a stretch, however, to apply the same standard to a student that has a certain appearance and marking that student for more monitoring, scrutiny and possible discipline. Although *Kuhlmeier* has its rightful place in American jurisprudence, it does not lend itself to being applicable when considering profiling of students based upon appearance.

Some may argue that *Fraser* may be the test applied by courts. In fact, it is the *Fraser* decision that dominates the majority of cases where student dress codes are challenged. The most interesting of these is *Boroff v. Van Wert City Board of Education*[80] where a public school student was prohibited from wearing a Marilyn Manson T-shirt (commonly described as "Goth" rock performer). The front of the T-shirt contained the picture of a three-faced Jesus with a caption reading "See No Truth, Hear No Truth, Speak No Truth." The back of the shirt contained the word "BELIEVE" with the letters "LIE" emphasized. The student challenged the district's action arguing that it violated the First Amendment to the United States Constitution. The Court upheld the ban based upon *Fraser*. The court did, however, highlight the importance *Fraser* plays in the First Amendment trilogy. If the speech to be suppressed is vulgar or patently offensive, *Fraser* controls and all inquiries stop. If the speech is not vulgar or patently offensive, then the analysis must shift to *Tinker*.[81] *Fraser* may allow educators to discipline or impose rules related to speech that is vulgar or patently offensive, it is not, however, rationally related to the ultimate goal – of monitoring or excluding students based upon personal appearance. That leads us back to *Tinker*.

Tinker provides the most compelling argument on behalf of a student that s/he is somehow profiled as a student likely to commit an act of violence at the school based upon appearance or affiliation. The hallmark of *Tinker* is the "substantial disruption" test. That is, has the speech (appearance) created a substantial disruption to the school environment. This is one area that a plethora of litigation is appearing.

It is appearing in the area of school district authority to discipline for off-campus misconduct as it relates to verbal attacks on school district personnel. This analysis must necessarily begin with *Boucher v. School Board of the School District of Greenfield.*[82] Applying a "reasonable forecast" standard, the court upheld a one year expulsion of a student for the creation and distribution of an off-campus underground newspaper that detailed several hacking procedures, including how to enter the computer setup utility, access system files, and see every file and login name in the system. Although only minimal disruption occurred, the court opined that an actual substantial disruption is not the standard – merely a "reasonable forecast" standard and the likelihood of possible future disruption. Courts are, however, reticent to apply a "reasonable forecast" standard if no actual threat of physical injury or harm results.[83]

The parallels between off-campus Internet activities challenging school district authority and profiling of students based upon outward physical appearance or group affiliation is striking. The most significant difference is, however, the common thread present in the Internet cases – an actual threat or implied threat to do harm. No such strand is present in groups such as the Trenchcoat Mafia. These students are merely expressing their individuality through physical appearance or actions. If such actions create a material disruption to the educational environment, school authorities are within their purview to take appropriate action. Rather, in profiling of students based upon appearance, no rational basis between the mere appearance and any material interference (or reasonable forecast) of a substantial disruption is present. Accordingly, to apply greater scrutiny to a student based upon appearance may run afoul of First Amendment jurisprudence.

Summary

The literature and law are clear. There is no scientific or other objective evidence to support the use of profiles to penalize or stigmatize public school students. All presently available "checklists" and "warning signs" carry blanket disclaimers of accuracy from their creators and are uniformly rejected as vague, if not discriminatory, collections of guesses and stereotypes. Any application of these profiles is fraught with official arbitrariness and caprice. Supporters of profiling talk in terms of doing everything imaginable to detect and deter anyone who would become the next Dylan Klebold or Eric Harris from passing through another schoolhouse gate. Unfortunately, profiling in schools is being used in ways that go beyond the manner of use in airports. It is, or can easily become, "a first step along the road to preventative detention" of individuals or group members who are seen as different and threatening. It seems that, in many ways, we have come full circle since John Tinker, his sister Mary Beth and Christopher Eckhardt came to Des Moines North High School with their black armbands on. In those days school officials were rightfully worried that the domestic violence that was consuming American cities and colleges over the Vietnam War would also invade the high schools. In much the same way that students who dress differently or challenge authority today, school officials acting according to what was later termed an "undifferentiated fear of disturbance"," concluded that the Tinkers and Eckhardt met a "profile" and moved against them. Such a basis of action was not enough in 1969 and is not enough now. For, as Justice Fortas wrote:

"In our system state operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under the Constitution."[84]

---

[1] Egger, Steven A. *Psychological profiling: Past, present, and future*, 5 J. of Contem. Crim. J. 242 (August 1999) 243.
[2] *Id.*, at 243.
[3] O'Toole, Mary Ellen, *Criminal Profiling: the FBI uses criminal investigative analysis to solve crimes*, v6 il 44(3) Corrections Today 47 (Feb. 1999).
[4] Egger, *supra* n. 1 at 247.
[5] Warren, J. I., Hazelwood, R.R. and Diets P.E., *The sexually sadistic killer*, 41 J. of For. Sci., 970 (1996)
[6] Davis, Joseph A., *Criminal Personality Profiling and Crime Scene Assessment*, 15 J. Contem. Crim. J., 291, 292 (August 1999).
[7] Douglas, J. E., *Criminal profiling: A viable investigative tool against violent crime*, 55 FBI L. Enf. Bull. 9.(1986)
[8] Davis, *supra* n.6 at 292.
[9] Egger, *supra* n. 1 at 245.
[10] *Id.*, at 297.
[11] Egger, *supra* n. 1 at 9.
[12] Douglas, J. E., Burgess, A.W., Burgess, A.C., and Ressler, R.K., *Crime classification manual*, Lexington, MA:Lexington Books (1992)
[13] Holmes, R.M., and Holmes, S.T., *Profiling violent crimes: An investigative tool*, Thousand Oaks, CA:Sage (1996)
[14] Davis, *supra* n.6 at 294.
[15] Flynn, Michael; Schwartz, Stephen I, *Any white powder will do*, 58 no.1 Bull. of the Atomic Sci. 6 (Jan/Feb 2002).
[16] Homant, Robert, Kennedy, Daniel B., *Psychological aspects of crime scene profiling*, v25 n4 Crim. J. and Behavior 319 (Sept 1998).
[17] Id., at 320.
[18] Phau, Ian; Prendergast, Gerard; Chuen, Leung Hing, *Profiling brand-piracy-prone consumers: an exploratory study in Hong Kong's clothing industry*, 5 n1 J. of Fashion Marketing Mgt. 45 (2001); Wiedmann; Buxel, Walsh, *Customer profiling in e-commerce*, 9 n2 The J. Database Marketing 170 (2002); Weber, Karin; Roehl, Wesley S., *Profiling people searching for and purchasing travel products on the World Wide Web*, v37 n3 J. of Travel Research 291 (Feb 1999); Carr, David. *Kiosks people actually use*, v 104 n28 Marketing Mag. 14 (July 19-26 1999) ; Maddox, Kate.*Web counting field crowds up with new player: NetRatings uses profiling system to track users*, 68 Advert. Age 56 (Nov. 3 1997); Ruotolo, Frank, *Will your top guns be dueling after closing?* v33 n6 Mergers & Acq. 57 (May/Jun 1999).
[19] Watson, *Profiling Teachers Competence and Confidence to teach Particular Mathematics Topics: the Case of Chance and Data*, 4 n4 J. of Math. Tea. Educ. 305 (2001).
[20] Dinwiddle, John, *Motiviational profiling of logistics Master's students in Great Britain*, 31 n3 Intl. J. of Phys. Distrib. and Logistics Mgt. 187 (2001).
[21]Forbes, Bob, *The 5th Factor, Behavior Profiling Opens New Possibilities for Web Access Control*, 11 n1 Info. Sys. Sec. (2002)
[22]Schlaeman, Steve, *Meet Your Cracker Intrusion Management Using Criminal Profiling*, 8 n3 Info. Sys. Sec. (1999).

[23] Jensen, William; Keppel, Lowell Bohman, Leo, *Physicians drive profiling system at Family Health*, v17 n3 Health Mgt. Tec.36 (Mar 1996).
[24] Pettit, Jan, Michael D. Kelleher, *Profiling the Lethal Employee Case Studies of Violence in the Workplace*, 31 n2 Crime, L. and Soc. Change 169 (1999).
[25] Ramirez, Deborah, McDevitt, Jack, Farrell, Amy; *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, DOJ Monograph (Nov 2000) 10.
[26] Skolnick, Jerome & Caplovitz, Abigail, *Guns, Drugs, and Profiling: Ways to target Guns and Minimize Racial Profiling*, 43 Ariz. L. Rev. 413 (2001)
[27]Harris, David A, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev 264 (1999).
[28] Heumann, Milton & Cassak, Lance, *Profiles in Justice? Police Discretion, Symbolic Assailants and Stereotyping*, 53 Rutgers L. Rev 911 (2001).
[29] 517 U. S. 806 (1996)
[30] *Id.*, at 813.
[31] See e.g., *Chavez v. Illinois State Police*, 27 F. Supp. 2d 1053 (1998)
[32] 979 P. 2d 833 (SC 1999).
[33] *Id.*, at 838.
[34] *Id.*, at 838.
[35] *Minnesota v. Varnado*, 528 N. W. 2d 886 (1998); *Arizona v. Gonzalez-Gutierrez*, 927 P. 2d 776 (1996)
[36] *Arkansas v. Sullivan*, 16 S.W. 3d 551 (2000)
[37] 734 A. 2d 350 (1996).
[38] *Id* at 352.
[39] *Id* at 357.
[40] National School Safety Center,< http://www.nssc1.org./reporter/ checklist.htm>(accessed February 7,2002).
[41] Dwyer, K.,Osher,D., Warger,C. (1998) . *Early Warning, Timely Response: A Guide to Safe Schools*. WashingtonD.C.:U.S.Dept.ofEd., <http://www.ed.gov/offices/OSERS/OSEP/early warning.html>(accessed February 8, 2002.)
[42] Id. at pp 7-8.
[43] McGee, J., DeBernardo, C., *The Classroom Avenger: A Behavioral Profile of School Based Shootings*,Forensic Examiner, May/June 1999.
[44] < http://helping apa.org/warningsigns/about.htm>l(accessed June 18, 2002).
American Association of School Administrators, http://www.aasa.org/publications/sa/2000_02/fey.htm> (accessed June 18, 2002).
[45] Id.
[46]Center for the Study and Prevention of Violence, http://www.colorado.edu/cspv/positions/position5.html> (accessed February 8, 2002).
[47] http://www.nassp.org/publicaffairs/stu_profiling.html.
[48] See, for example: R. Craig Wood and Mark D. Chestnutt, *Violence in U.S. Schools: The Problems and Some Responses*, 97 Ed. L. Rep. 619 (April 20, 1995); Eric W. Schulze and T.J. Martinez, *Into the Snakepit: Section 1983 Liability Under the State-Created Danger Theory for Acts of Private Violence at School*, 104 Ed. L. Rep. 539 (Dec. 28, 1995); Todd A. DeMitchell, *Security With the Schoolhouse Gate: An Emerging Fundamental Value in Educational Policy Making*, 120 Ed. L. Rep. 379 (Oct.16, 1997); Cary Silverman, *School Violence: Is it Time to Hold School Districts Responsible for Inadequate Safety Measure?*, 145 Ed. L. Rep. 535 (Aug. 31, 2000); Douglas Stewart and Charles Russo, *Maintaining Safe Schools*, 151 Ed. L. Rep. 363 (April 26, 2001).
[49] James A. Rapp, *Education Law* Sec.12.06 [7][b][ii](Mathew Bender, 1998)
[50] Id. at Sec. 9.02
[51] Nadine Strossen, Keeping The Constitution Inside the Schoolhouse Gate-Students' Rights Thirty Years After *Tinker v. Des Moines Independent Community School District*, 48 Drake L. Rev. 445 (2000).
[52] http://www.hamfish.org/resources/record/20/
[53] 328 F. Supp. 1077 (1971).
[54] 374 F. Supp. 1098 (E.D. N.Y. 1972), *aff'd*, 474 F.2d 699 (2d Cir. N.Y. 1973), *cert denied*, 414 U.S. 820 (1973).
[55] 464 F.2d 667(2d Cir. N.Y. 1972).

[56] *Id.* at pp. 8-9.
[57] http:// www.secretservice.gov/ntac/ssi_final_report.pdf.
[58] http:// www. secretservice.gov/ntac/ssi_guide.pdf.
[59] *Id.*, at 19.
[60] *Id.* at 19-21.
[61] *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 35 (1973).
[62] 347 U.S. 483, 493 (1954).
[63] *Goss v. Lopez* 419 U.S. 565, 574 (1974).
[64] *West Virginia v. Barnette,* 319 U.S. 624, 637 (1943).
[65] *Tinker v. Des Moines Independent School District*, 393
[66] *Kinzer v. Independent School District,* 129 Iowa 441, 105 N.W. 686 (1906).
[67] *New Jersey v. T.L.O.* , 469 U.S. 325, (1985).
[68] *Bethel School District v. Fraser*, 478 U.S. 675 (1986); *Weimerslage v. Maine Township High School District*, 29 F. 3d 1149(7th Cir. 1994); *Fuller ex. rel Fuller v. Decatur Public School District*, 251 F. 3d 662, 666(7th Cir. 2000)
[69] *Grayned v. City of Rockford*, 408 U.S, 104 (1972).
[70] *Kolender v. Lawson* 461 U.S. 352, 357 (1983).
[71] *U.S. v. Lopez* 328 F. Supp. 1077,1100 (1971).
[72] *Id.* at 1100.
[73] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).
[74] *Id* at 509.
[75] *Id* at 509.
[76] Jennifer Joseph, ABCNEWS.com , *Who is the Trenchcoat Mafia*?
[77] 478 U.S. 675 (1986).
[78] 26 F.3d 728, 737 (7th Cir. 1994).
[79] 484 U.S. 260 (1988).
[80] 220 F.3d 465 (6th Cir. 2000).
[81] *Id.*
[82] 134 F.3d 821 (7th Cir. 1998).
[83] *Beussink v. Woodland R-4 School District*, 30 F.Supp.2d 1175 (E.D.Mo. 1998) (Despite the school district's offering of evidence that students, teacher and administrators were discussing the website and that two class periods were disrupted for a few minutes each time, the court ruled that the disruption did not rise to the level of justifying the student discipline.); *Emmett v. Kent School District No. 415*, 92 F.Supp.2d 1088 (W.D. Wash., 2000) (The court held that the school could not show that a website containing mock obituaries of students with a place to vote on who would "die next," – *i.e.* who would be the subject of the next mock obituary – and therefore overturned the disciplinary action imposed). Actual injury was found in *J.S. by and through H.S. and I.S. v. Bethlehem Area School District*, 757 A.2d 412 (Pa. Cmmnw. Ct. 2000) where a teacher asserted emotional and physical distress as a result of a disparaging web site.
[84] *Tinker*, supra n. 73, at 511.

U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)

NOTICE

Reproduction Basis

[X] This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.

[ ] This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").